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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

SUPREME COURT NO. ~~65~~ 56

GERALD WILLIAM NELSON and
JOHN E. HATTON,
Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

On Writ of Certiorari to the Supreme Court of the United States from the Supreme Court of Tennessee.

REPLY BRIEF

On Behalf of the Respondent Limited to the Jury Question.

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On Writ of Certiorari to the Supreme Court of the United States from the Supreme Court of Tennessee.

REPLY BRIEF

On Behalf of the Respondent Limited to the Jury Question.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINION BELOW.

The petitioners, Nelson and Hatton, were indicted and convicted for damaging or destroying real property with explosives in the Criminal Court of Knox County, Tennessee. Section 39-1401, Tennessee Code Annotated.* Each was sentenced to be confined in the State Penitentiary

* Tennessee Code Annotated, 1955. The first number represents the title, and the second, the section in Tennessee Code Annotated. (See Appendix A for the text of the statute.)

for a period of three (3) years (R. 11). Assigning errors, they duly perfected their appeals to the Supreme Court of Tennessee, where, according to its opinion, only two assignments were presented (R. 11-15, 55). In disposing of the two assignments of error, the State's highest Court held that:

> (a) The pre-trial statements or confessions of the petitioners were properly admitted in evidence; and
>
> (b) The trial court did not commit reversible error by allowing the State to challenge for cause prospective jurors who were members of labor unions (R. 53-61).

The first proposition is not before this Court. As to the latter, the State's highest tribunal held that the State was entitled to twenty-four (24) peremptory challenges as distinguished from any number of challenges for legal cause. Thirteen (13) peremptory challenges were used for undisclosed reasons by the State, leaving eleven (11) additional ones unused. While empanelling the jury, the trial court permitted the State to challenge fourteen (14) prospective jurors for cause because they were members of labor unions. The Court reasoned that the effect of the trial court's action was to grant the State three (3) peremptory challenges in addition to those allowed by statute. Although the action of the trial court was found to be erroneous, the State Supreme Court refused to reverse the cause because it concluded that the petitioners received a fair and impartial jury trial (R. 58-61).

As to the other facts relevant to the case, the State relies upon the recitation of facts contained in the opinion of the Supreme Court of Tennessee (R. 53-55).

In granting the petition for the writ of certiorari to the Supreme Court of Tennessee, this Court limited the writ to the jury question. **Nelson v. State of Tennessee** (1957), ... U. S. ..., 77 S. Ct. 328 (R. 63).

JURISDICTION.

The jurisdictional statements in both the petition for certiorari and the brief in support of it are inadequate.

The petitioners insist that this Court is clothed with jurisdiction under Title 28, Section 1257 (3), U. S. C. A. (Petition for Certiorari, p. 2; Petitioners' Brief, p. 1).

In their brief, the petitioners make the following jurisdictional allegations:

> "The judgment of the Supreme Court of the State of Tennessee was entered July 20, 1956 (R. pp. 61-62):
>
> "Motion for leave to proceed in forma pauperis and petition for certiorari filed September 14, 1956. Motion was granted (R. pp. 63-64). Certiorari granted, limited to the jury question, December 17, 1956. The jurisdiction of this Court rests upon the due process clause and the Fourteenth Amendment to the Constitution" (Petitioners' Brief, pp. 1-2).

For a number of reasons, this jurisdictional statement is inadequate.

1. There is nothing in the record, the petition for certiorari, or the petitioners' brief indicating that the question of whether the petitioners were denied their constitutional rights under the Fourteenth Amendment on the jury issue were considered or decided (a) by the Criminal Court of Knox County, Tennessee, or (b) by the Supreme Court of Tennessee. Under the Tennessee practice, it was necessary for the petitioners to file a motion for a new trial setting forth the various errors allegedly committed by the trial court. The motion for a new trial was seasonably made and it complains of the action of the trial court in permitting the State to challenge for cause the persons summoned for jury duty who were members of labor unions. Allegedly, this was error, violating Article I, Section 6, Constitution of Tennessee. No reference was made to the

Fourteenth Amendment in the motion for a new trial in the trial court as to empanelling the jury (R. 12). It was necessary for this question to be raised in the motion for a new trial so that it might be considered by the trial court. **Webb v. State**, 173 Tenn. 518, 519, 121 S. W. 2d 550. Neither do the assignments of error presented to the Supreme Court of Tennessee contain an assignment with reference to this proposition (R. 29-35). If the proposition had been submitted to the Supreme Court of Tennessee, it might have been considered by that Court, although it was not assigned as error. **Thompson v. State**, 190 Tenn. 492, 230 S. W. 2d 977. However, since the proposition is not mentioned in the opinion of the Supreme Court of Tennessee, the assumption is warranted that a substantial Federal question on the jury issue under the Fourteenth Amendment was not presented to the State courts. **Mutual Life Insurance Company v. McGrew**, 188 U. S. 291, 309, 23 S. Ct. 375.

The State submits that it is manifestly unfair to the trial court and the Supreme Court of Tennessee to allow the petitioners to raise constitutional issues under the Fourteenth Amendment with reference to empanelling the jury for the first time in this Court. **Hulbert v. Chicago**, 202 U. S. 275, 26 S. Ct. 617; **Honeyman v. Hanan**, 300 U. S. 14, 18, 57 S. Ct. 350, 8 L. Ed. 476.

This case should be distinguished from those where persons unlearned in the law have attempted to protect their rights by preparing their own defenses in the trial courts and on appeal. In the State courts the petitioners were represented by able and experienced counsel. Neither is this a habeas corpus proceeding in which a prisoner unwittingly cited the Sixth Amendment instead of the Fourteenth Amendment, as in **Gibbs v. Burk**, 337 U. S. 773, 779, 69 S. Ct. 1251.

2. If the State is correct as to (1) above, it follows that a substantial Federal question has not been presented and

the general statements in the petitioners' brief, as to a judgment having been entered by the Supreme Court of Tennessee, and as to certiorari having been granted by this Court limited to the jury question, are too vague, indefinite, and generalized to show jurisdiction in this Court. Rule 40 (b), Supreme Court of the United States, Revised Rules.

3. In addition, if the Court is of the opinion that the jurisdictional grounds stated in the petition for certiorari should be considered, it is appropriate to point out that there the petitioners relied entirely upon the third assignment of error presented to the Supreme Court of Tennessee (Petition for Certiorari, p. 2). That assignment of error complained about the admission of confessions or statements of the petitioners which were alleged to have been obtained in a manner contrary to the "bill of rights" and the Fifth and Fourteenth Amendments. Clearly, the jurisdictional statement does not show that a Federal question was raised as to the "jury question." Indeed, the jurisdictional statement is completely silent as to the "jury question" and, therefore, does not and could not state, present, nor define a substantial Federal question on the jury issue.

4. Finally, it should be noted that the Supreme Court of Tennessee construed the State's harmless error statute as establishing a legislative policy which, under the circumstances of the case, overrode the State's legislative policy with reference to peremptory challenges. The petitioners have failed to challenge the application of the harmless error statute under the Federal Constitution. In considering the "jury question," the State contends that this Court of necessity must decide whether the State Courts' construction of the harmless error statute amounts to an unconstitutional application of the statute depriving the petitioners of a substantial Federal right. Thus, it would appear necessary for the petitioners to challenge the constitutionality of the application of the harmless

error statute in the State Courts. Having failed to do so, the proposition should not be considered in this Court.

In the early case of **F. G. Oxley Stave Company v. Butler County**, 166 U. S. 48, 655, 17 S. Ct. 709, 41 L. Ed. 1149, this Court, in discussing whether a right claimed under a treaty could be asserted when the question was first presented to the state supreme court on a petition to rehear which was overruled, observed that the jurisdictional averments respecting substantial Federal rights cannot be the subject of inference.

Hence, the failure of the petitioners to allege a substantial Federal question, on the jury issue as required by the law and the rules of this Court, is fatal, and the writ should be dismissed.

QUESTIONS PRESENTED.

Since the State insists that this Court is without jurisdiction, this subject was partially discussed under the heading "Jurisdiction".

After reviewing the record, the petition for certiorari, and the brief on the jury question, it seems that two questions control the merits of this controversy.

First, were the petitioners denied a fair jury trial within the meaning of Article I, Section 6, Constitution of Tennessee, by the action of the trial court in allowing the State to challenge for cause all prospective jurors who were members of labor unions?

Second, under the Fourteenth Amendment, is it permissible for a state court to construe its harmless error statute as curing error where the prosecution is allowed to exceed the number of peremptory challenges authorized by state statute, because the state was allowed to challenge prospective jurors who were members of labor unions for cause?

STATUTES INVOLVED.

The basic qualifications of jurors are contained in Section 22-101, Tennessee Code Annotated.* The State statutes also provide that various classes of persons are not qualified for jury service, certain persons are exempt, others are excused, and others may be disqualified. Sections 22-102-105, Tennessee Code Annotated.* A grand or petit juror may be discharged for reasonable or proper cause if he does not possess the requisite qualifications or if his state of mind will prevent him from acting impartially. Section 22-106, Tennessee Code Annotated.* Any woman may be excused by notifying the Court that she does not desire to serve as a juror. Section 22-108, Tennessee Code Annotated.*

Any person who does not possess the qualifications set out in the Code Sections may be challenged for cause. Section 22-301, Tennessee Code Annotated.* Either party may challenge for cause litigants with causes pending in court or persons who have served on a jury at a term during the two years next preceding.

In this case, no insistence is made that the jurors who were summoned for jury duty were discharged for any of the statutory reasons.

In addition to unlimited challenges for cause, either party is entitled to peremptory challenges under Section 40-2510, Tennessee Code Annotated (copied in Appendix C).

Tennessee's harmless error statutes are Sections 27-116 and 117, Tennessee Code Annotated (copied in Appendix D). The latter was applied by the State Court in this case.

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* These Code sections are copied in Appendix B.

SUMMARY OF ARGUMENT.

(1) This Court is without jurisdiction because the petitioners did not raise a substantial federal question on the jury issue in the State Courts, nor have they alleged a substantial federal question in this Court.

(2) The case was decided in the State Court on an adequate nonfederal ground. In the State Court it was insisted that the action of the trial court, on allowing the State to challenge for cause prospective jurors who were members of labor unions, violated Article I, Section 6, Constitution of Tennessee. No contention was made that a federal constitutional right was involved. The State Court held that the State Constitution guaranteed a fair and impartial jury trial which the petitioners had received. The construction of the State Constitution by the State Court is final and cannot be reviewed by this Court.

(3) There was no violation of the Fourteenth Amendment. The petitioners received a real trial, not a sham. The State has a broad discretion in administering its jury system which may even be abolished at its pleasure. Accordingly, if an accused is tried by a fair and impartial jury no fundamental right is invaded, nor has due process been denied if there was a real trial. Equal protection under the laws does not require a state to administer every state statute on the basis of absolute equality.

In weighing the statutes concerning harmless error and peremptory challenges, the rights of the petitioners were carefully considered, indicating that the State Court did not act unreasonably nor arbitrarily. It decided that the petitioners were afforded a fair and impartial jury trial, and, therefore, it was proper to apply the harmless error statute.

The cases, approving dual jury systems with unequal peremptory challenges allowed in a single state and ap-

proving the exclusion of certain classes of persons from jury service by statute, appear to present stronger arguments than the instant case that equal protection was denied.

Finally, the burden is on the petitioners to show how their rights have been adversely affected. No contention is made here that they suffered injury at the hands of the jury. Since the jury which tried them was fair and impartial, they cannot be heard to complain.

ARGUMENT.

The Opinion of the State Court Rests Upon an Adequate and Independent Nonfederal Ground.

As to the "jury question," the assignments of error urged upon the Supreme Court of Tennessee charged that the trial court violated Article I, Section 6, Constitution of Tennessee, by allowing the State to challenge for cause prospective jurors. The Section provides:

> "That the right of trial by jury shall remain inviolate and no religious or political test shall ever be required as a qualification for jurors." Article I, Section 6, Constitution of Tennessee.

The opinion of the State Court does not discuss by name this Section of the State Constitution. However, the cases cited and deemed by the Court to control the case at bar contain discussions of the requirements of Section 6, Article I.

In keeping with the prior decisions of **Mahon v. State**, 127 Tenn. 535, 548, 156 S. W. 458; **Manning v. State**, 155 Tenn. 266, 292 S. W. 451; **Cooley v. State**, 174 Tenn. 168, 174, 124 S. W. 2d 250; and **England v. State**, 196 Tenn. 186, 264 S. W. 2d 815, the State's highest tribunal in substance construed the State's constitutional provision, holding that the provision guaranteed a fair and impartial jury trial, and nothing more. The nature of the constitutional guaranty on the subject of selecting and rejecting jurors was summarized in **Manning v. State**, supra, as follows:

> "Article 1, Section 6, of the Constitution providing that jury trial shall remain inviolate protects the right as it existed at common law. **State v. Sexton**, 121

Tenn. 35. The Constitution assures a fair and impartial trial before a fair and impartial jury, but this does not mean blind adherence to useless forms—the reason for which lies in the forgotten past, and the necessity for which cannot be adapted to existing conditions.

"The right of challenge for cause was designed to exclude from the jury triers whose bias or prejudice rendered them unfit, and peremptory challenge was intended to exclude those suspected of bias or prejudice. Both rights of challenge were assured at common law, as procedural instruments for use to reject jurors as a means of obtaining an impartial jury, which is all that the common law proposed to give, and all that the fundamental law assures. The right to challenge is not the right to select a juror. If from those who remain after the right of rejection has been exercised, an impartial jury is obtained the traditional right of the accused is maintained."

The application of the foregoing to the instant case is obvious, and, clearly, demonstrates the fallacy of the argument that the State Constitution was violated.

In the Manning, Mallon, Cooley, and England cases, the harmless error statute was applied. In them, the Court held that Section 27-117, Tennessee Code Annotated,* forbids the reversal of causes where errors have been committed in the selection or rejection of jurors, provided the accused received a fair and impartial jury trial. Therefore, these cases and others decided by the Supreme Court of Tennessee support the Court's disposition of the case at bar. The petitioners cannot be heard to complain of the action of the State Court in construing the State Constitu-

* The harmless error statute codified the accepted rule of practice in the state Supreme Court. *Harness v. State* (1912), 126 Tenn. 365, 149 S. W. 911.

tion in conformity with its earlier decisions. Certainly, it cannot be successfully argued that a state constitutional right was denied.

The construction of the State Constitution is a problem for the State Court and is not a proper subject for review by this Court. In **Highland Farms Dairy, Incorporated, v. Agnew** (Va., 1937), 300 U. S. 608, 57 S. Ct. 549, the rule was stated:

> "A judgment by the highest court of the State as to the meaning and effect of its own Constitution is decisive and controlling everywhere."

In the Court below, the petitioners insisted that the allowance of one peremptory challenge in addition to those authorized by statute required a reversal under **Vines v. State**, 190 Tenn. 644, 231 S. W. 2d 332. The argument was rejected and the case was distinguished with the Court stating its reasons (R. 59). In addition, the cases of **Wiggins v. State**, 69 Tenn. 736, and **Foutch v. State**, 100 Tenn. 334, 45 S. W. 678, are relied upon as controlling the state law. In Wiggins, the Court held that under the statutes then in effect the state was entitled to four peremptory challenges irrespective of the number of defendants on trial. The Foutch case appears to be subject to the same objections as the Vines case, although it is not discussed in the state court's opinion. As to all of these cases, it should be stated that it was the function of the state court to determine and declare the state law. Having done so, the issue is foreclosed in this Court. **Black v. Cutter Laboratories** (1956), 351 U. S. 292, 76 S. Ct. 824.

Thus, it follows that the state decision rests upon an adequate and independent nonfederal ground and this Court is without jurisdiction of the cause, requiring a dismissal of the writ. **Black v. Cutter Laboratories**, supra;

Herb v. Pitcairn (Ill., 1945), 324 U. S. 117, 65 S. Ct. 459, 89 L. Ed. 789; **Enterprise Irrigating Dock v. Farmers' Mutual Canal Company**, 243 U. S. 157, 37 S. Ct. 318, 61 L. Ed. 644.

The Problems Under the Fourteenth Amendment.

The State's position is that the State Court reached the correct result on the "jury question" under the Fourteenth Amendment although the proposition was neither presented to nor considered by the State Court.

As indicated in stating the "questions involved," the Supreme Court of Tennessee was confronted with reconciling, if possible, two State statutes which the State's General Assembly had the power to enact. **Truax v. Corrigan** (1921), 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375. They equally declare the policy of the State. The first prescribes the number of peremptory challenges allowed parties to criminal proceedings.* Section 40-2510, Tennessee Code Annotated. The second provides that the appellate courts will not reverse causes for technical errors not affecting the result of trials. Section 27-117, Tennessee Code Annotated. The function of the Court was to give effect to two widely divergent legislative policies, if it could do so by protecting fundamental rights. Under Article I, Section 6, Constitution of Tennessee, the petitioners were entitled to a trial by a fair and impartial jury as a fundamental right. This they received so the Court concluded that the legislative policy relating to "harmless errors" should prevail.

The problem concerns the rejection instead of the selection of jurors. **Hayes v. State of Missouri** (1887), 120 U. S. 68, 7 S. Ct. 350; **Manning v. State**, supra.

* The state may fix by statute the number of peremptory challenges to which the parties are entitled. *Ashe v. United States ex rel. Valotta* (1926), 270 U. S. 424, 46 S. Ct. 333.

As to the argument of the applicability of the Fifth and Sixth Amendments, the State insists that they apply only to Federal Courts and not to the state courts. **Palko v. State of Connecticut** (1937), 320 U. S. 319, 58 S. Ct. 149. Therefore, no additional discussion appears necessary on these propositions. This Court has also held that the provisions of the Fourteenth Amendment with respect to jury trials do not prohibit the State from regulating and restricting them, since they are not encompassed within the immunities or privileges clause which the States are forbidden to abridge. **Maxwell v. Dow**, 176 U. S. 581, 20 S. Ct. 448, 44 L. Ed. 597.

This leaves for consideration the applicability of the due process and equal protection clauses of the Fourteenth Amendment. This Court has considered a large number of situations concerning the selection of juries under the amendment. However, there are only a few instances in which the problem of rejection has been presented.

No case decided by this Court has been found which squarely decides the question at bar.

As a basic proposition, the State maintains that these petitioners cannot be heard to complain since they received a fair and impartial jury trial. This means that they were entitled to and received a real trial, and not a sham, as pointed out in the Palko case. It also means that they cannot demand anything more than an impartial jury. **Hayes v. State of Missouri** (1887), 120 U. S. 71, 7 S. Ct. 350; **Brown v. New Jersey** (1889), 175 U. S. 172, 20 S. Ct. 77. As observed by the late Mr. Justice Jackson in **Fay v. People of the State of New York**, 332 U. S. 261, 288, 67 S. Ct. 1613, ". . . They have no constitutional right to friends on the jury," and society is as much entitled to a fair trial as they. If the petitioners have reason to be-

lieve that the jury which tried them was more apt to convict, they have the burden of demonstrating to the Court that this was true. **Akins v. State of Texas** (1945), 325 U. S. 398, 400, 65 S. Ct. 1276. They have not only failed to assume the burden, but, by their silence, have indicated that the result of the trial would not have been different. Their claim, apparently, rests upon the proposition that the technical requirements of state statutes must be followed or there is a denial of due process. Such a position is patently unsound. In **Maxwell v. Dow**, supra, this Court asserted:

> "Trial by jury has never been affirmed to be a necessary requisite of due process of law." 176 U. S. 603.

The State further contends that the petitioners have been afforded equal protection of the laws under the Fourteenth Amendment.

The equal protection clause does not require that state statutes be administered with mathematical exactness. In this connection, in **Snowden v. Hughes** (1944), 321 U. S. 1, 8, 64 S. Ct. 397, in discussing alleged damages to civil rights, the Court declared:

> ". . . The insistence is rather that the Board, merely by failing to certify petitioner as a duly elected nominee, has denied to him a right conferred by state law and has thereby denied to him the equal protection of the laws secured by the Fourteenth Amendment.
>
> "But not every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another. Where, as here, a statute requires official action discriminating

> between a successful and an unsuccessful candidate, the required action is not a denial of equal protection since the distinction between the successful and unsuccessful candidate is based on a permissible classification. And where the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws.
>
> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

In other words, this Court has adopted the rule that every denial of a right conferred by state law does not involve a denial of equal protection. Unquestionably, the State's statutes involved here are fair on their face and there has not been a showing of intentional or purposeful discrimination. On the contrary, this is the only instance in which it is alleged that a trial court has permitted the State to reject prospective jurors for cause on account of their membership in labor unions, and, since the conduct of the trial court was disapproved by the State Supreme Court, such an error is not likely to recur.

The jury system in every state is the creature of the state. A state may or may not afford jury trial. **Maxwell v. Dow**, supra; **Palko v. State of Connecticut**, supra; **Sweezy v. State of New Hampshire** (1957), ... U. S. . . . , 77 S. Ct. 1203. Consequently, it would appear that the states have wide discretion in establishing and administering jury systems. 35 C. J., p. 360, Juries, Section 399. The Tennessee Court has not acted capriciously nor arbitrarily

in this matter, and it appears to have exercised reasonable discretion.

This Court has approved the practice of establishing two jury systems which may coexist in a single state, although different qualifications are prescribed for jurors and a different number of peremptory challenges are authorized as between the two systems. **Fay v. People of the State of New York**, supra; **Brown v. New Jersey**, supra. If the maintenance of separate jury systems, where each provides for a different number of peremptory challenges, may coexist in a single state under the equal protection clause, it seems that the case at bar presents an even stronger argument for the proposition that there has been no denial of equal protection.

In another situation, this Court found that there had not been a denial of equal protection where the names of negroes were not placed on the jury list in numbers in proportion to the total population. Since a purpose to discriminate, which may be proved by systematic exclusion, was not shown to exist, there was no denial of equal protection. **Akins v. State of Texas**, supra. This doctrine was announced by the Court, although the Congress had found it appropriate to implement the Fourteenth Amendment with legislation which granted redress in the Federal courts. The Akins case appears to be a stronger situation for applying the equal protection clause than the case at bar.

The legislative policy of excluding certain classes of people from jury service appears to be closely akin to this case. However, Mr. Justice Holmes, speaking for the Court, held that the Fourteenth Amendment was not violated by the legislature of Georgia which excluded certain classes of persons from jury duty. **Rawlins v. State of Georgia** (1906), 201 U. S. 638, 26 S. Ct. 560. He also observed that,

when persons liable to jury duty under state law are excluded; it is no ground for challenge to the array under the Fourteenth Amendment if a sufficient number of unexceptional persons were present.

As we understand these cases and the rules adopted by this Court, the equal protection clause does not require that every statute of every state shall be administered in every instance with absolute equality. The state courts must construe the various legislative enactments so as to harmoniously reconcile them, if possible, with the State and Federal Constitutions. In other words, there is no reason for any person to complain if he has received basic fairness and equal justice. Certainly, no argument has been advanced in this instance to show that the petitioners were treated unfairly or unjustly. Under these circumstances, a reversal of this case for a new trial by the State courts would appear to amount to nothing more than an idle ceremony, because the petitioners have not shown that their rights have been injuriously affected by the jury which tried them. The State court was not unmindful of the rights of the petitioners under the State Constitution and concluded that those rights were duly protected. Under such circumstances, the State Supreme Court did not act unreasonably nor arbitrarily in applying the harmless error statute.

It is persuasive that in a number of other states it is not reversible error for prospective jurors to be rejected for insufficient cause concerning qualifications so long as a fair and impartial jury is obtained. **Keady v. People**, 32 Col. 57, 74 Pac. 892, 66 L. R. A. 353; **Pittsburg etc. Railroad Co. v. Montgomery**, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301; **State v. Huff**, 118 La. 194, 42 So. 771; **Bluthenthal v. May Advertising Co.**, 127 Md. 277, 96 Atl. 434; **State v. White**, 48 Ore. 416, 87 Pac. 137.

CONCLUSION.

In conclusion, the respondent respectfully insists that the writ should be dismissed for the reasons stated above and the judgment of the Supreme Court of Tennessee should be affirmed.

Respectfully submitted,

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Certificate of Service.

The undersigned, a member of the bar of the Supreme Court of the United States and one of the counsel of record for the respondent, hereby certifies that on the ..... day of November, 1957, he served the within and foregoing reply brief upon the petitioners in the following manner as prescribed by Rule 33, Revised Rules of the Supreme Court of the United States: He deposited at the Post Office at Nashville, Davidson County, Tennessee, two copies each of the within and foregoing reply brief securely fastened in

an envelope, air mail postage duly prepaid, addressed to the following at his post office address as stated below, that is to say:

Honorable Hobart F. Atkins,
Attorney at Law,
410 Cumberland Avenue, S. W.,
Knoxville 2, Tennessee.

James M. Glasgow,
Assistant Attorney General.

APPENDIX A

Tennessee Code Annotated

39-1461. **Malicious injury to structures with explosives Penalty.** — Any person who willfully and maliciously damages or destroys any dwelling, business house, building, outhouse or any other structure, the property of himself or of another, by the use of dynamite or any other explosive, shall be deemed guilty of a felony, and upon conviction shall be punished by confinement in the state penitentiary for a period of time not less than one (1) year nor more than twenty-one (21) years.

APPENDIX B

Tennessee Code Annotated

22-101. **Basic qualifications.**—Every person of the age of twenty-one (21) years, being a citizen of the United States, and a resident of the state of Tennessee, and of the county in which he or she may be summoned for jury service for a period of twelve (12) months next preceding the date of such summons, is legally qualified to act as a grand or petit juror, if not otherwise incompetent under the express provisions of the Code. A woman shall have the option of serving or not when summoned to jury duty.

22-102. **Incompetent persons.**—Persons convicted of certain infamous offenses, specially designated in this Code, persons of unsound mind, persons not in the full possession of the senses of hearing and seeing, and habitual drunkards, are incompetent to act as jurors.

22-103. **Occupational and disability exemptions.**—The following persons are exempt from liability to act as jurors: All persons holding office under the laws of the United States, or of this state; all employees of the railway mail service; all practicing attorneys, physicians, and clergymen; all acting professors or teachers of any college, school, or institution of learning; all members of fire companies; all persons over sixty-five (65) years of age, disabled by bodily infirmity, or specially exempted by any other positive law; all pharmacists registered under and in accordance with the laws of the state. Service in the national guard shall be accepted in lieu of all jury duty while actually in the military service of the state.

22-104. **Excuse from service.**—Any person may be excused from serving as a juror, when the state of his own health, or that of his family, requires his absence, or when,

for any reason, his own interests, or those of the public, will, in the opinion of the court, be materially injured by his attendance.

22-105. **Disqualification by interest or relationship.**—No person can act as a juror in any case in which he is interested, or when either of the parties is connected with him by affinity or consanguinity, within the sixth degree, computing by the civil law, except by consent of all the parties.

22-106. **Discharge of unqualified jurors.**—The court may discharge a grand or petit juror from service who does not possess the requisite qualifications, or who is exempt or disqualified from such service, or for any other reasonable or proper cause, to be judged of by the court. That a state of mind exist on his part toward law enforcement or which will prevent him from acting impartially, shall constitute such cause.

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22-108. **Women not desiring to serve as jurors may be excused.**—Any woman may, when summoned by an officer or otherwise, at that time state to said officer or notify the court by mail, that said woman does not desire to serve and she may thereby be excused from such service.

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22-301. **Challenge for general causes of incompetency.**—Either party to an action may challenge for cause any person presented as a petit juror, in either a civil or criminal proceeding, who is incompetent to act as a juror under the provisions of chapter 1 of this title.

APPENDIX C.

Tennessee Code Annotated

40-2510. **Peremptory challenges.**—In the trial of criminal cases, the peremptory challenges of jurors shall be as follows: In the trial of capital cases, the state shall be allowed six (6) for each defendant and each defendant shall be allowed fifteen (15) peremptory challenges. In the trial of all other felonies, the state shall be allowed for each defendant four (4) and each defendant shall have eight (8) peremptory challenges. In the trial of misdemeanors, the state for each defendant and each defendant shall be allowed three (3) peremptory challenges.

APPENDIX D.

Tennessee Code Annotated

27-116. **Reversal on merits.**—No judgment, decision, or decree of the inferior court shall be reversed in the appellate courts, unless for errors which affect the merits of the judgment, decision, or decree complained of.

27-117. **Technical errors affecting result.**—No verdict or judgment shall be set aside or new trial granted by any appellate court, in any civil or criminal cause, on the ground of error in the charge of the judge to the jury, or on account of the improper admission or rejection of evidence, or for error in acting on any pleading, demurrer, or indictment, or for any error in any procedure in the cause, unless, in the opinion of the appellate court to which application is made, after an examination of the entire record in the cause, it shall affirmatively appear that the error complained of has affected the results of the trial.